IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND
RECLAMATION ASSOCIATION,
THE COMMONWEALTH OF VIRGINIA, AND
THE TOWN OF WISE, VIRGINIA,
Appellees.

No. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

STATE OF INDIANA, INDIANA COAL ASSOCIATION,
MEADOWLARK FARMS, INC., AMAX COAL COMPANY,
PEABODY COAL COMPANY, AND JOHN A. CONLON,
Appellees.

No. 80-231

On Appeals From The United States District Court For the Western District of Virginia, and The United States District Court For the Southern District of Indiana

BRIEF OF THE STATES OF ALASKA, HAWAII, IDAHO, KENTUCKY, LOUISIANA, NEBRASKA, NEW MEXICO, OKLAHOMA, RHODE ISLAND SOUTH DAKOTA AND UTAH, AS AMICI CURIAE

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The several States appearing as *amici curiae* here respectfully urge the Court to affirm the decisions of the respective district courts in Virginia and Indiana holding that Title V of the Federal Surface Mining Control and Reclamation Act of 1977 unconstitutionally interferes with inherent sovereign powers of the States to regulate the use of private non-federal lands within their borders, and with State land-use decisions respecting the development of mineral resources vital to the progress and prosperity of their communities and citizens.

INTERESTS OF AMICI CURIAE

The constitutional issues presented in these cases are of critical importance to the States in terms of retaining control over their essential State powers, and their ability to continue to function effectively within a federal system. If the authority to determine the appropriate use of private lands within the States may, by Congressional fiat, be transferred to a federal agency in Washington an essential element of State sovereignty is effectively destroyed, and long established federal-state relationships drastically altered.

From the earliest days of the Republic the individual States and their constitutent counties and municipalities have exercised land use powers, subject only to constitutional limitations upon taking of private property without just compensation and due process of law under the Fourteenth Amendment. *Penn Central Transportation Company* v. *New York City,* 438 U.S. 104 (1978). Such land use powers have included the promulgation of zoning laws and regulations, enforcement of building codes, granting and terminating permits for operation of mines and quarries, imposition of severance taxes on minerals

extraction, exercise of eminent domain, and many related police power functions. As noted by this Court in *Warth* v. *Seldin,* 422 U.S. 490, 508 n.18 (1975) "[Z]oning laws and their provisions, long considered essential to urban planning, are peculiarly within the province of the State and local legislative authorities." See also, *Village of Euclid* v. *Ambler,* 272 U.S. 365 (1926).

It hardly need be emphasized that the States have an overriding interest in preservation of these integral functions, and are deeply concerned by the federal government's assertion of preemptive power under the Surface Mining Act to dictate the land use criteria which a State must adopt and enforce as a precondition to permitting surface mining on lands within the State. Although the Act's Statement of Policy in section 101(f) purports to recognize State primacy "in developing, issuing and enforcing regulations for surface mining and reclamation operations," the actual effect of Title V is quite the opposite since it provides that unless a State regulatory program conforms in all respects with the standards established by the Act and the regulations issued by the Secretary of the Interior the State program is displaced by a federal program enforced and administered by the Secretary.

TITLE V OF THE ACT CONSTITUTES LAND USE LEGISLATION WHICH SUPERCEDES STATE GOVERNMENTAL PROCEDURES FOR LAND USE PLANNING, AND, AS SUCH, USURPS POLICE POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

Each of the respective district courts below found, with abundant supporting evidence, that the focus and thrust of the Surface Mining Act is control of the use of

land, and that its effect is to preempt the traditional land use powers reserved to the States under the Tenth Amendment. Any doubt as to the preemptive character of the Act is quickly dispelled by the plain language of Section 503 which provides that a State may not allow private lands within its jurisdiction to be used for surface coal mining unless it adopts a state law providing for regulation of surface mining and reclamation operations, and imposes sanctions for violations of such regulations, which "shall meet the minimum requirements of this Act." Other sections of Title V prohibit surface mining on various categories of lands, require that a State desiring to retain any enforcement authority under the Act must establish a planning process for designating other land areas as unsuitable for mining in accordance with the specified criteria of the Act, and dictate in great and massive detail the terms and conditions under which a State may grant or renew permits for surface coal mining. (Sections 502, 506, 507, 522). The Act also deals extensively with permissible post-mining use of lands after mining and reclamation have been completed. (Section 508). To suggest, as the Secretary does, that these provisions are not preemptive of State powers is to ignore reality.

Moreover, the Act on its face boldly asserts its preemptive effect. Section 504 directs that the Secretary promulgate and implement a federal program for any State which fails to adopt a State program meeting the Secretary's approval, and that promulgation of such a Federal program "vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance

with this Act." Whenever a federal program is promulgated for a State by the Secretary "[A]ny statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations shall . . . be *preempted and superceded* by the Federal program." (Section 504(g)). Emphasis added.

Despite this starkly coercive language the Secretary continues to argue that the States are not compelled to enforce the Act, but are merely *encouraged* to enforce it. The reality is that the only option given to a State is to adopt federally dictated regulatory criteria or reliquish all State authority over surface mining and leave the field to the federal enforcers. In substance, Congress has said to the States "You cannot allow your lands to be used for surface mining unless you comply with the federally mandated terms and conditions, and if you do not accept such terms and conditions the Secretary of the Interior will assume and administer your land use powers." The "choice" which the Secretary contends the Act allows the States is an illusion. Whether a State elects to adopt federally mandated land use policies and enforcement procedures, or abdicates these functions to the Secretary of the Interior, the result is the same—the State's authority to determine the appropriate use of land is subordinated to the federal power. The principles enunciated by the Court in *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1963) make it clear that where it is shown that a federal program involves "weapons of coercion, destroying or impairing the autonomy of the States" Tenth Amendment questions are squarely presented. The Surface Mining Act's provisions leave little room for doubt that they are "weapons of coercion."

THE COMMERCE CLAUSE POWERS OF THE FEDERAL GOVERNMENT DO NOT JUSTIFY FEDERAL REGULATION OF PRIVATE LANDS WITHIN STATE JURISDICTION

Over the past 40 years since its Decision in *United States* v. *Darby,* 312 U.S. 100 (1941), the Court has broadly construed the federal commerce power to cover many activities previously regarded as purely local in nature, but has never held, or even intimated, that land *as such* is subject to regulation under the Commerce Clause. In the relatively few cases in which the subject has been even touched upon the Court has uniformly held that federal land use powers are limited to those which are derived from the Property Clause of Article 4, section 3, Clause 2 of the Constitution, i.e., legislative powers over federally owned lands. See, *Kansas* v. *Colorado,* 206 U.S. 46 (1906); *United States* v. *Arizona,* 295 U.S. 174 (1935); *Kleppe* v. *New Mexico,* 426 U.S. 529 (1976); *California* v. *United States,* 438 U.S. 645 (1978). In *McCready* v. *Virginia,* 94 U.S. 391 (1877) the Court noted that "Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." 94 U.S. at 396. This premise is as valid today as it was 100 years ago.

Even if it were assumed, however, that the reach of the commerce power extends to land use it would not justify federal usurpation of the historic reserved powers of the States in this field. As noted in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its plenary powers to tax or to regulate

commerce which are conferred by Article I of the Constitution," 426 U.S. at 842, and "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from expressing the authority in that manner." 426 U.S. at 845. The test in judging whether federal regulation is constitutionally permissible is whether it interferes with a State's "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The Court has recognized as "constitutional policy" that Congress "may not exercise its power in a fashion that impairs the States' integrity or their ability to function in a federal system." *Fry* v. *United States,* 421 U.S. 452 (1975).

The preemptive scheme embodied in Title V of the Surface Mining Act works just such an impairment of State sovereignty. Land use planning is by any measure one of the "integral" functions through which the States can make provision for the orderly development of their natural resources, as well as promoting employment and economic sustenance for their citizens, and revenue sources for essential services furnished through State and local governmental agencies. Because the States are closer to the problems and needs of their local communities and citizens than are the federal bureaus in Washington they are obviously in a better position to make the necessary decisions in these vital areas. What is even more obvious is the fact that it was never the intent of the framers of the Constitution that the central government could override the sovereign powers of the States in such areas.

Gibbons v. *Ogden,* 22 U.S.1, 203 (9 Wheat.) (1824); *Brown* v. *Maryland,* 25 U.S. 419, 444 (12 Wheat.) (1827); *New York* v. *Miln,* 36 U.S. 102.[1] (1837) *Kansas* v. *Colorado,* 206 U.S. 46 (1906).

The rationale advanced in justification for the exercise of the commerce power in this statute hangs on the premise that there are environmental values at stake in the use of land for surface mining, and that the environmental concerns of the federal government must be given precedence over the multitude of economic, social and political priorities which may be advanced by the States. The district courts below correctly perceived, however, that the focus of Title V is on the land itself and not on the commerce aspects of land use, and that the end result is creation of a body of federal police powers which displace the traditional police powers of the States.

Hence, the ultimate question presented is whether the target of the federal Act, i.e. land, can by any valid rationale be held to be in commerce. If land *as land* is not in commerce a Congressional incantation that its use affects interstate commerce cannot serve to bring it within the scope of federal regulatory powers under the commerce clause.

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[1] As the Court noted in *Miln,* "...[I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." 36 U.S. 139.

A contrary conclusion would open a Pandora's Box which could shatter the structure of the federal system as it now exists, since there is almost no use of land which could not to some extent at least be held to affect interstate commerce, whether such use be agriculture, forestry, industrial plants, warehouses, retail shopping centers, or countless other purposes. In the end, all lands used or having a potential use for any activity affecting commerce become proper subjects for federal land use regulations.

THE FIFTH AMENDMENT ISSUES

Amici believe that the district courts below have properly held that the provisions of Title V of the Surface Mining Act effectively destroy land values, and in their operation and effect deprive the owners of the mineral estates in coal lands of valuable property rights without just compensation and in violation of the due process clause of the Fifth Amendment. While these are issues of grave concern to the States, *amici* will leave to those most directly affected the task of arguing the applicable points of law. *Amici* will simply observe that a severe injustice will be wrought upon their citizens if the guarantees of the Fifth Amendment can be casually overridden by federal legislation of this sort.

CONCLUSION

The constitutional implications of a further expansion of federal regulatory powers into the zone of land use are immense. The Surface Mining Act raises the critical question of whether Congress can effectively amend the Constitution through the simple mechanism of making a legislative finding that the use of land for a particular purpose affects interstate commerce. Such a confiscation of reserved powers is not constitutionally permissible unless the Tenth Amendment has no force and effect in confrontation with the Commerce Clause. For these reasons the decisions of the district courts below should be affirmed.

Respectfully submitted,

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